



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570-0001

VIA CM/ECF

April 17, 2017

Molly Dwyer, Clerk of the Court
Office of the Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Boeing Company v. NLRB*, Nos. 15-72894 and 15-73101

Dear Ms. Dwyer:

Pursuant to Rule 28(j), the Board submits for the Court's information the D.C. Circuit's decision in *Banner Health System v. NLRB* (*Banner II*), 851 F.3d 35 (D.C. Cir. 2017), granting enforcement in part to *Banner Estrella Medical Center* (*Banner I*), 362 NLRB No. 137 (June 26, 2015).

In *Banner II*, the court enforced the Board's finding that the employer unlawfully maintained a confidentiality agreement ("the Agreement") subjecting employees to potential discipline for sharing "[p]rivate employee information (such as salaries, disciplinary action, etc.)." 851 F.3d at 39. In so doing, the court noted settled precedent that employees may lawfully discuss discipline and disciplinary investigations with colleagues. *Id.* at 41-42. The court held further that the Agreement was not tailored to the employer's interest in complying with antidiscrimination and privacy laws. *Id.* at 42-43. The court also enforced the Board's order to post a company-wide remedial notice because the evidence did not support that the Agreement was used in only one location. *Id.* at 43.

Banner II is consistent with the Board's finding in this case that Boeing's confidentiality policy unlawfully restricts employees' right to discuss workplace

investigations with colleagues. *See* Board Br. 13-16, 20-31. The D.C. Circuit’s ruling also supports finding that Boeing’s policy is not necessary to comply with other employment statutes, *id.* at 40-41, and that a nationwide remedial notice-posting is appropriate because Boeing applies the policy at most of its facilities, *id.* at 45-49.

Separately, *Banner II* found that the record lacked substantial evidence showing that the employer in fact maintained a nondisclosure rule prohibiting employee discussions of workplace investigations. 851 F.3d at 43-44. Given that fact-based finding, the court stated that it “need not ... opine on the Board’s requirement of a case-by-case approach to justifying investigative confidentiality.” *Id.* at 44 (citation omitted). Therefore, *Banner II* does not affect the Board’s finding that Boeing’s policy unlawfully failed to weigh its need for confidentiality against employees’ Section 7 rights on a case-by-case basis, or the Board’s reliance on *Banner I* for that point. *See* Board Br. 16, 33-34, 38 & n.20.

Respectfully submitted,

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-1714

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cc: Charles Nisbet Eberhardt, Luke Rona, Lindsay McAleer
Counsel for Boeing Company
Maurice Baskin
Counsel for Amicus Curiae National Association of Manufacturers